Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers	)))))))	WC Docket No. 03-251

COMMENTS OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES IN RESPONSE TO THE NOTICE OF INQUIRY CONCERNING THE BUNDLING OF LEGACY AND ENHANCED SERVICES

I. INTRODUCTION

The National Association of State Utility Consumer Advocates ("NASUCA")[1] submits these comments in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Inquiry in the above-captioned proceeding. NASUCA's comments concern the competitive consequences when providers of telecommunications services bundle their legacy services with enhanced services, or "tie" such services together such that the services are not available independently to end users.

[1] NASUCA is a voluntary association of 44 advocate offices in 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA's members are designated by the laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. See, e.g., Ohio. Rev. Code Chapter 4911; 71 Pa.Cons.Stat. Ann. § 309-4(a); Md. Pub.Util.Code Ann. § 2-205; Minn. Stat. § 8.33; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General's office). NASUCA's associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

Initially, NASUCA concurs with the dissenting portion of the statement of Commissioners Copps and Adelstein regarding the decision of the Commission in the Memorandum Opinion and Order ("MO") in the present docket. NASUCA believes, like Commissioners Copps and Adelstein, that the decision reached by the Commission gives the "green light" to tying arrangements that limit consumer choice.[2] Indeed, the Commission's decision in the MO appears to raise more questions than it answers. Many consumers are now choosing Voice over Internet Protocol ("VoIP") or cellular service in lieu of traditional landline voice service. It is unfortunate, however, that consumers that make the choice of switching to nontraditional providers of voice services are precluded from purchasing "naked" digital subscriber line ("DSL") service from most carriers. We note that QWEST is currently selling naked DSL service without the requirement of landline service and SBC has indicated it is going to experiment with a similar offering in one or more of its markets.[3] No doubt the decisions of these two incumbent LECs are based on recognition of the changes taking place in the telecommunications marketplace. Apparently, some of the LECs would rather drive out competition than offer access to standalone DSL.

The bundling of legacy services with enhanced services obviously has implications for the success of competition, both intramodal and intermodal. Most importantly, if bundling forces consumers to purchase services they do not want or need in order to obtain basic local service and other desired services, then from the consumer's standpoint, the economic

[2] MO, Dissent of Commissioners Copps and Adelstein. Specific examples of harmful tying arrangements that are permissible under the Commission's ruling in the MO are posed by the questions in the dissent, "If it is permissible to deny consumers DSL if they do not also order analog voice service, what stops a carrier from denying broadband service to an end-user who has cut the cord and uses only a wireless phone? What prevents a carrier from refusing to provide DSL service to a savvy consumer who wants stand-alone broadband only for VoIP?"

[3] Roper, John C., *Tangled up over DSL, Some cell phone users demand to stand alone*, Houston Chron., May 24, 2005.

efficiencies of bundling disappear. The Commission places too high a premium on the benefits of bundling while seemingly ignoring the downside of bundling run amok in the form of tying arrangements.

In its *Bundling Order*," the Commission touted the price benefits of bundling by focusing on the "low rate" available for bundled services as well as the desirability of dealing with one provider for their varied telecommunications needs.[4] The Commission also found in the *Bundling Order* that bundling of products and services is pro-competitive because it allows competitors to differentiate themselves from one another while allowing providers to target segments of the market.[5] Because LECs were required to offer basic local exchange service on an unbundled, tariffed, nondiscriminatory basis, the Commission found that there were adequate safeguards in place that would curb the ability of the incumbent LECs to use bundling in an anti-competitive manner.[6] The Commission determined that because consumers could purchase enhanced services from competitive providers while purchasing local service from the incumbent LECs pursuant to tariff, the incumbent LECs could not discriminate against their customers.[7]

Unfortunately, the Commission did not consider the ramifications of the LECs prohibiting access to their DSL service to existing or potential customers who did NOT subscribe to the LECs' traditional voice service. Even at this early juncture, the Commission did not consider the ramifications of permitting the tying of its bottleneck voice service with enhanced

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[4] *Policy and Rules Concerning The Interstate, Interexchange Marketplace*, CC Docket Nos. 96-61, 98-183, Report and Order (March 21, 2001), FCC 01-98 ("*Bundling Order*"), ¶10.

[5] Id., ¶14.

[6] Id., ¶44.

[7] Id. ("Customers would therefore be able to purchase enhanced services from competitive providers and still obtain local service from the incumbent pursuant to the tariff. This prevents the incumbent carriers from discriminating against customers who purchase enhanced service from competitive suppliers.")

services. Intramodal competition was jeopardized early on by this rationale.

An important justification by the FCC for loosening the strictures on bundling was the increase in local competition.[8] The Commission should reexamine its justification for its recent decisions that effect bundling and tying arrangements, such as those that were the subject of the MO in this docket. There is a great deal of evidence that intramodal competition is on the decline for basic local service, with the number of competitive providers declining rapidly and the number of major mergers on the increase. A decrease in intramodal competition is already occurring and the incumbent LECs continue to enjoy bottleneck control of access to traditional wireline voice service. These conditions threaten future intramodal competition.

Customers who are interested in purchasing a single, stand-alone service should not be held hostage to the bundled offerings of the incumbent LECs. They should be free to purchase enhanced services from one provider and legacy services from another. Accordingly, the FCC should reassess its decision on tying with regard to naked DSL and should not allow tying of other LEC services, especially basic local service.

II. STATE REGULATION OF BUNDLING OR TYING ARRANGEMENTS

NASUCA agrees with Z-Tel in the above captioned-docket that section 706 of the 1996 Act encouraging the deployment of enhanced services such as broadband does not create merely a federal duty.[9] The states should retain the capability to regulate the local markets relative to the bundling of enhanced and legacy services such as local exchange service. At a minimum, states

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[8] Id., ¶¶30-31, 33.

[9] See Z-Tel Comments at 9-10,quoting section 706 ("[T]he Commission and each State Commission . . . shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by adopting "measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.")

should be free to prevent the type of tying arrangements that occur when dominant providers tie the purchase of enhanced services to the purchase of legacy services.[10] States are ideally situated to monitor the market conditions that exist within their jurisdiction. The monitoring of the local markets permits the states to determine which bundling arrangements enhance customer choice rather than hinder it. Intramodal competition, in terms of the number of providers of local intrastate voice service, may be on the wane. Bundling of legacy services by dominant carriers could well destroy intramodal voice and enhanced service competition before it blossoms. State oversight is greatly needed.

Fundamental in ensuring that bundling does not force consumers to purchase services they neither want or need in order to obtain the services they desire is the requirement that LECs must offer telecommunications services separate from CPE or enhanced services.[11] Bundling is not a panacea that ensures customer choice and the development of competitive markets. Bundling of legacy services with enhanced services should continue to be an option for consumers – but not the only option.[12] States are the appropriate laboratories for determining which packages of service offerings are appropriate and which bundling or tying practices threaten competition and consumer choice.

While there may be price benefits with the bundling of services, through the lowering of transaction costs, there are risks to consumers as well. Ohio, like most states, has experience with the bundling of basic local service with optional, non-basic services. Under the Retail Local

[10] Z-Tel Comments at 15.

[11] *Bundling Order* at ¶18 ("[T]he separate availability of the components of a package on nondiscriminatory terms, whether through the functioning of a competitive market for each component or through existing regulatory requirements, is essential to prevent the improper extension of market power.")

[12] See Vonage Comments at 11.

Service rules[13] established by the Public Utilities Commission of Ohio ("PUCO"), certain incumbent LECs are afforded relaxed regulatory and pricing treatment by merely bundling "non-basic" services with basic local exchange service.[14] Bundling of legacy services with enhanced, nontraditional services should not result in fewer consumer protections and *less* choice.

III. CONCLUSION

The Commission should revisit its decision to preempt the states from regulating the provision of "naked" DSL. States are the appropriate arbiters for determining when bundling results in improper tying arrangements and are much better suited to prescribe appropriate remedies. Incumbent LECs should be required to continue to offer both legacy and enhanced services on an ala carte basis regardless of the various packages of bundled service available to consumers.

Respectfully submitted,

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[13] Ohio Adm. Code 4901:1-6-01 through 4901:1-6-24. These rules apply to all incumbent LECs choosing to participate in a qualifying alternative regulation plan set forth in Ohio Adm. Code 4901:1-4.

[14] Ohio Adm. Code 4901:1-6-21.

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